

United States Government

NATIONAL LABOR RELATIONS BOARD

Region 27

600 17th Street - Suite 700 North

Denver, CO 80202-5433

March 31, 2010

Ms. Kristin Martin
Local 23 UNITE HERE
Davis Cowel and Bowe
595 Market Street
San Francisco, CA 94105

Re: Aramark Inc. at the Pepsi Center and Coliseum
Case 27-RC-8583

Dear :Ms. Martin:

The above-captioned case, petitioning for an investigation and determination of representative under Section 9(c) of the National Labor Relations Act, has been carefully investigated and considered.

On January 22, 2010, the petition in this above-captioned matter was filed by Local 23 UNITE HERE (UNITE HERE). As a result of the investigation, I find that further proceedings are unwarranted.

The investigation disclosed that the instant petition, seeking an election among the Employer's employees "in the currently organized bargaining unit of Local 14 at the Pepsi Center and Coliseum in Denver, Colorado", was filed at a time when the Employer was obligated, pursuant to the resolution of an unfair labor practice investigation, to bargain with Local 14, Rocky Mountain Joint Board, Workers United – SEIU (Local 14). In this regard, charges were filed against Aramark, Inc., by Local 14 regarding this bargaining unit.¹ Local 14, which has represented these employees through numerous successive contracts, disaffiliated from UNITE HERE, and became an affiliate of Workers United-Service Employees International Union, in March 2009. The charges alleged that after the change in affiliation, the Employer refused to grant access to Local 14 representatives, escrowed dues deductions, and refused to bargain with the Local 14. During the investigation, the Employer asserted that it was refusing to bargain with Local 14 because of competing claims by Local 14 and UNITE HERE that were unresolved.

After an extensive investigation, the Regional Director concluded that there was sufficient continuity of representation so that Local 14 remained the Section 9(a) representative of the employees in the Pepsi Center and Coliseum bargaining unit. Thus, the Regional Director found sufficient evidence to warrant issuing complaint to allege that the Employer

¹ Charge Nos. 27-CA-21206 and 27-CA-21265.

violated the Act by making unilateral changes such as escrowing dues and not forwarding them to the designated agent, refusing to allow the designated representatives of the employees' bargaining agent access to the Employer's facility, and refusing to meet and bargain with the Union for a new collective-bargaining agreement.

When notified that the Region would issue complaint absent settlement, the Employer agreed, by letter, to resolve the charges by, *inter alia*, recognizing and bargaining with Local 14, in exchange for the issuance of a conditional dismissal letter by the Regional Director, which was issued on December 15, 2009. The Employer specifically committed to recognize and bargain with Local 14 and to include language in the conditional dismissal letter creating an insulated period comparable to the insulated period created by a settlement agreement as described in *Poole Foundry & Machine CO.*, 95 NLRB 34, (1951). Local 14 was aware of these discussions and gave its assent to the issuance of a conditional dismissal letter including the *Poole Foundry* language as a resolution of the charges.

UNITE HERE has argued that *Poole Foundry* is inapplicable in this matter, and the Region should instead rely on *Lexus of Concord*, 343 NLRB 851 (2004). In *Lexus of Concord*, while the union and the employer were bargaining a contract, a majority of employees signed a petition indicating they no longer wanted the union to represent them, and demanded that the employer cease negotiations. When the employer refused to meet with the union, the union filed an unfair labor practice charge, and shortly thereafter, the employees filed a decertification (RD) petition. The regional director suspended processing of the RD petition in light of the union's refusal to bargain charge. Two days later, the employer sent a letter to the union stating that it was confident that the parties could continue bargaining in good faith, despite the employees demand that it cease negotiations. The regional director issued a dismissal letter on non-effectuation grounds, noting that the Employer had reaffirmed its recognition of the union and its obligation to continue bargaining. The employer met one more time with the union and then withdrew recognition based on the earlier petition. The union filed another charge alleging an unlawful withdrawal of recognition. The Board, in finding no violation, noted that there was no settlement bar that would preclude either the processing of the petition or a withdrawal of recognition, since the employer did not enter into a settlement agreement, express or implied, with the regional director or the union that would act as a *quid pro quo* for dismissal of the charges. As such, the employer was permitted under *Levitz Furniture*, 333 NLRB 717 (2001) to withdraw recognition from the Union.

The Region is of the view that *Lexus of Concord*, is distinguishable. In *Lexus*, the Administrative Law Judge inferred that the employer's commitment to bargain with the union was a *quid pro quo* for the regional director's dismissal of the charges, an assumption that the Board determined was unfounded. In the unfair labor practice charge that is related to this case, the Regional Director issued a letter to the Employer indicating that the Region was authorized to issue complaint, and urged the Employer to commit to resolve all of the outstanding allegations. The Employer responded with a letter specifically offering to resolve the charges by enumerating all of the actions it would take to resolve the allegations raised in the charges if the Region would issue a conditional dismissal letter. Thus, it is clear from the language and intent of the letter, that this is the type of *quid pro quo* that was lacking in *Lexus*, and the settlement bar principles should apply.

Further, the Region in this case did not issue a non-effectuation letter as was done in *Lexus*, but issued a *Conditional Dismissal* letter instead, finding that there was merit to the allegations. The dismissal of the charge is conditioned upon the Employer's commitment to resolve all of the meritorious allegations and the lack of any meritorious charges being filed

within the six months following the issuance of the conditional dismissal letter. This was a settlement that was agreed to by the parties as a means of resolving the allegations short of an unfair labor practice trial before a judge and further proceedings before the Board.

The Region has determined that there is no Question Concerning Representation at this time. When an Employer has unlawfully refused to recognize and bargain with an incumbent labor organization, employee disaffection evidenced during the course of such conduct will be presumed to be caused by that conduct, and the resulting bargaining obligation will bar a challenge to the incumbent's majority status. *Lee Lumber and Building Material Corp.*, 334 NLRB 399 (2001). In this case, the Employer has agreed to negotiate in good faith with Local 14 in order to resolve unfair labor practice charges. The conditional dismissal letter in Cases 27-CA-21206 and 27-CA-21265 issued on December 15, 2009. The showing of interest in support of this petition was dated from December 2009 to early January 2010, a time when the unfair labor practices had not yet been remedied, and evidenced both disaffection with Local 14 and support for the Petitioner. The petition form was filed on January 22, 2010, and the Employer and Union had not met to begin negotiations on a new collective-bargaining agreement until January 26, 2010. Thus, it is not appropriate to conclude that the "reasonable time" period as contemplated under *Poole Foundry* has expired. In *Lee Lumber*, the Board stated that, when an Employer has unlawfully refused to recognize or bargain with an incumbent union, a reasonable time for bargaining before the union's majority status can be challenged will be no less than 6 months, but no more than 1 year. Clearly, in these circumstances the parties had not even begun to engage in bargaining for a new contract when the instant petition was filed. Thus, the incumbent Union did not have a "reasonable time" to meet and bargain with the Employer prior to UNITE HERE's challenge to Local 14's majority status. Accordingly, the Petition must be dismissed.

Right to Request Review: Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business on **April 14, 2010, at 5 p.m. Eastern Time** unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.² A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

² A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Filing a request for review electronically may be accomplished by using the E-Filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, click on E-Filing, and follow the detailed directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was off-line or unavailable, the sending machine malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Sincerely,

Michael W. Josserand, Regional Director
Michael W. Josserand
Regional Director

MWJ:TBS/stm
Attachments

cc:

Mr. Richard Rosenblatt
Richard Rosenblatt & Associates, LLC
8085 E. Prentice Avenue
Greenwood Village, CO 80111

Mr. Richard Hesse
GM
Aramark, Inc. at the Pepsi Center and Coliseum
6595 S. Dayton Street
Greenwood Village, CO 80111

SEIU, Workers United, Local 14
2525 W. Alameda Ave
Denver, CO 80219

Mr. Taylor Hudson
Organizer
PO Box 49212
Denver, CO 80249

ATTACHMENT

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Section 103.20 Posting of Election Notices

(a) Employers shall post copies of the Boards official Notice of Election in conspicuous places at least three (3) full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least five (5) working days prior to the election that it has not received copies of the election notice.

(d) Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under provisions of Section 102.69(a).

Dated, Washington, D.C., June 30, 1987, by direction of the Board.

National Labor Relations Board
John C. Truesdale, Executive Secretary

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